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No. 03-1097

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DANA J. RITCHESON,
Petitioner,

v.

CC SERVICES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

The parent corporations of respondent CC Services, Inc. are the Illinois Agricultural Association, Country Life Insurance Company, and Country Mutual Insurance Company. No publicly held company owns more than 10 percent of the stock of CC Services, Inc.

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BRIEF IN OPPOSITION

The petition for certiorari should be denied because it presents no issue worthy of this Court's attention. Although the petition claims a conflict, every Circuit to have addressed the question agrees with the Seventh Circuit that a purely lateral transfer, without more, cannot support a prima facie case of employment discrimination. And there is no other reason for this Court to review the decision below.

STATEMENT OF THE CASE

A. The Facts.

Dana J. Ritcheson was hired in 1979 by an affiliated company of CC Services. Pet. App. 2a. Ritcheson first worked in southern Illinois, where she performed both claims processing and secretarial duties. *Id.* In 1998, she was promoted to a Property Specialist I position – which

entailed working as a claims adjuster for property loss – in Las Vegas, Nevada. *Id.*; Second Am. Compl. ¶ 11. In June 2000, Ritcheson applied for a lateral transfer to a vacant Property Specialist I position in Vienna, Illinois. Pet. App. 2a; Second Am. Compl. ¶¶ 17-18.

The position for which Ritcheson applied in Vienna was identical to the position she already held in Las Vegas. As Ritcheson conceded at her deposition, the Vienna position had the same title, pay, benefits, duties, and responsibilities. *See* Ritcheson Dep. pp. 36-37, Ex. A to Def.'s S.J. Mot (S.D. Ill. filed Nov. 22, 2002). She further conceded that, had she been given the Vienna job, it would have been a lateral transfer. *Id.* at 37. Although Ritcheson argued below that her opportunities for future advancement would be greater were she in Vienna, Pet. App. 2a, the lower courts concluded that no evidence in the record supports that view. *Id.* at 4a-5a. To the contrary, the evidence demonstrates that advancement opportunities were equally available company-wide to all personnel, and that "[n]o employee has an advantage over any other employee for a supervisory position because of his or her geographical location." Statement of Joseph Gibson ¶ 3, Ex. C. to Def.'s S.J. Mot.

CC Services ultimately selected a 36-year-old male to fill the Vienna position. Pet. App. 2a. At that time, Ritcheson was 42 years old. *Id.*

B. District Court Proceedings.

After filing the requisite charge of discrimination with the EEOC, Ritcheson filed suit in the United States District Court for the Southern District of Illinois, alleging discrimination and retaliation on the basis of her sex and her age in violation of Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act (ADEA). Ritcheson's discrimination claim was based solely

on the denial of her request for a lateral transfer. She based her retaliation claim on an allegedly unpleasant interaction with another employee of CC Services, Don Sauzek, who reviewed the insurance claims files assigned to Ritcheson several months after she filed her EEOC claim.

Following discovery, CC Services moved for summary judgment on all of Ritcheson's claims. On the discrimination claim, CC Services contended that the denial of a transfer from one position to an identical position was not sufficient to support a prima facie case, because denying such a lateral transfer was not a materially adverse employment action. *See* Def.'s S.J. Mot. at 4-5. In opposing summary judgment, Ritcheson did not contend that she had direct evidence of discrimination. Instead, she claimed only that she had sufficient indirect evidence to survive summary judgment under the burden-shifting framework established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S 792 (1973). *See* Pl.'s Opp. to S.J. Mot. at 2 (S.D. Ill. filed Dec. 16, 2002) (citing Seventh Circuit cases setting forth prima facie elements of *McDonnell Douglas* test).

The District Court initially denied the motion for summary judgment with respect to Ritcheson's discrimination claim. It reasoned that the denial of a lateral transfer was a "tangible employment action" and was therefore actionable under Title VII and the ADEA, whether or not it adversely affected her conditions of employment. Pet. App. 13a.

The District Court granted summary judgment to CC Services on Ritcheson's retaliation claim. The District Court first noted that the Seventh Circuit had indicated in dicta "that retaliation does not have to involve an adverse employment action to be actionable." Pet. App. 14a (citing *Herrnreiter v. Chicago Transit Auth.*, 315 F.3d 742, 745 (7th Cir. 2002)). The District Court nevertheless rejected Ritcheson's

retaliation claim on the ground that there was no evidence that Sauzek, at the time he reviewed the insurance claims files assigned to Ritcheson, had any knowledge that she had made or filed any employment discrimination charges against CC Services. *Id.* (citing Statement of Don Sauzek ¶ 12, Ex. B to Def.'s S.J. Mot.). As the District Court recognized, "knowledge of the protected activity is necessary in order to retaliate against a person for engaging in that protected activity." *Id.*

After the Seventh Circuit issued *Grayson v. City of Chicago*, 317 F.3d 745 (7th Cir. 2003), CC Services made a motion for reconsideration with respect to Ritcheson's discrimination claim. In *Grayson*, the Seventh Circuit held that discrimination could not be inferred under *McDonnell Douglas* in the absence of a "materially adverse employment action." *Id.* at 748 (citing *Ribando v. United Airlines, Inc.*, 200 F.3d 507, 510 (7th Cir. 1999)). *Grayson* further held that this requirement could not be met when the position denied to the plaintiff was "identical to his present position in all but name." *Id.* at 747, 750. Applying that decision to this case, the District Court concluded that Ritcheson "sought essentially the same job that [she] held before and after the employment decision was made." Pet. App. 9a. Accordingly, the District Court held she could not establish a prima facie case of employment discrimination and granted summary judgment to CC Services.

C. The Seventh Circuit's Decision.

Ritcheson appealed only the District Court's rejection of her discrimination claim. In an unpublished per curiam, the Seventh Circuit affirmed.

Consistent with the law in every Circuit to have reached the question, *see infra* pp. 6-9, the Seventh Circuit held that "[a] purely lateral transfer cannot rise to the level of an

adverse employment action" sufficient to support a prima facie case of employment discrimination. Pet. App. 4a (citing *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996)). The Seventh Circuit acknowledged that "[a]n employee would be adversely affected, however, by a transfer that 'significantly reduces the employee's career prospects by preventing him from using the skills in which he is trained and experienced, so that the skills are likely to atrophy and his career is likely to be stunted.'" *Id.* (quoting *Herrnreiter*, 315 F.3d at 744).

The Seventh Circuit then ruled against Ritcheson on the facts of this case: "Ritcheson does not point to evidence in the record to support her assertion that the transfer to southern Illinois would 'enhance her career prospects.'" Pet. App. 4a-5a. Moreover, the Seventh Circuit held that Ritcheson had essentially waived that argument because she did "not . . . develop this argument nor substantiate these statements with references to the record." *Id.* at 5a. Accordingly, as the Circuit explained, "[b]ecause the brief and Ritcheson's oral argument taken together do not give us an adequate basis on which to follow her argument, this argument fails." *Id.* (citing *Albrechtsen v. Bd. of Regents of Univ. of Wis. Sys.*, 309 F.3d 433, 436 (7th Cir. 2002), cert. denied, 123 S. Ct. 2606 (2003); Fed. R. App. P. 28(a)(9)).

Finally, the Seventh Circuit distinguished this case from the only Circuit case with which Ritcheson's petition for certiorari claims a conflict. *See* Pet. at 13-14 (citing *Maddow v. Proctor & Gamble Co.*, 107 F.3d 846, 852-53 (11th Cir. 1997)). In *Maddow*, the Eleventh Circuit "held that an older employee had suffered an adverse employment action when she was offered a position in Alabama after telling her interviewer that she would accept a position only in Atlanta." Pet. App. 5a-6a. But, as the Seventh Circuit concluded, "*Maddow* involved facts that distinguish it from

this case: there the employer was highly likely to offer the employee a job, despite knowing that she would work only in Atlanta." Pet. App. 6a (citing *Maddow*, 107 F.3d at 853). "By contrast, Ritcheson has not shown how the denial of her request to move to Vienna affected the terms and conditions of her work." *Id.*

On January 27, 2004, Ritcheson filed a petition for certiorari. On March 24, 2004, this Court requested a response.

REASONS FOR DENYING THE WRIT

1. The facts of this case present no Circuit conflict. Ritcheson bases her discrimination claim solely on CC Services' refusal to transfer her to an identical position, with the same title, pay, duties, responsibilities, and opportunities for advancement as the position she already held. Relying solely on the *McDonnell Douglas* burden-shifting framework, Ritcheson sought to create a circumstantial case of discrimination even though she could not show that CC Services had adversely affected the terms and conditions of her employment in any way. Agreeing with every Circuit to have considered the question, the Seventh Circuit held that, without more, the refusal to grant such a purely lateral transfer could not support a prima facie case of discrimination. Pet. App. 4a-5a.

Indeed, the Circuits are unanimous that, for the denial of a transfer (or a forced transfer) to support a prima facie case of discrimination, it must entail some objectively negative employment-related consequence. As the District of Columbia Circuit observed in 1999, "a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action." *Brown v. Brody*, 199 F.3d 446, 455-57 (D.C. Cir. 1999) (federal Title VII claims) (citing cases;

internal quotation marks omitted); *see also, e.g., Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 641 (2d Cir. 2000) (ADEA); *Fallon v. Meissner*, 66 Fed. Appx. 348, 351-52 (3rd Cir. 2003) (unpublished table decision) (ADEA); *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 283-85 (5th Cir. 2004) (Section 1981); *Kocsis v. Multi-Care Mgmt. Inc.*, 97 F.3d 876, 885-87 (6th Cir. 1996) (Americans with Disabilities Act); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144-45 (8th Cir. 1997) (Title VII); *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 531-32 (10th Cir. 1998) (Title VII).[1] In adopting this position, these Circuits have relied upon Judge Posner's decision in *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270 (7th Cir. 1996) announcing that very principle – making clear that the Seventh Circuit is in line with the other Circuits. *See, e.g., Brown*, 199 F.3d at 455.

Contrary to petitioner's assertion, *see* Pet. at 13-14, there is no conflict between the decision below and the Eleventh Circuit's 1997 decision in *Maddow v. Procter & Gamble Co.*, 107 F.3d 846 (11th Cir. 1997). To begin with, the Seventh Circuit expressly distinguished *Maddow* on the facts. Pet. App. 5a-6a. The Seventh Circuit thus may well have reached the same result as the Eleventh Circuit on the different facts in *Maddow*.

In any event, Ritcheson is wrong that a purely lateral transfer is in and of itself sufficiently adverse to support a prima facie case of discrimination in the Eleventh Circuit. *See* Pet. at 13. To the contrary, since *Maddow*, the Eleventh Circuit has made clear that, for a transfer to support a prima facie case of discrimination, the employee "must demonstrate that a reasonable person in his position would

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[1] "Courts of appeals routinely apply the same standards to evaluate Title VII claims as they do ADA claims, ADEA claims, and even ERISA claims." *Brown*, 199 F.3d at 456 n.10.

have found his transfer to be adverse under all the facts and circumstances." *Doe v. DeKalb County Sch. Dist.*, 145 F.3d 1441, 1453 (11th Cir. 1998). The Eleventh Circuit thus rejected any notion that a transfer is always adverse or that it is adverse if the employee subjectively believes it to be. Instead, consistent with the law of other Circuits, the Eleventh Circuit held that the standard should be an objective one, and that a transfer to an objectively identical position cannot support a prima facie case of discrimination. *Id.* at 1449-50.

In reaching its conclusion, the Eleventh Circuit expressly relied upon Judge Posner's decision in *Williams*:

> Outside our own circuit, persuasive authority suggests even more strongly that we should use a reasonable person standard to determine whether a plaintiff has suffered an adverse employment action. The Seventh Circuit, in particular, has repeatedly declared that "a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action."

Id. at 1449 (quoting *Williams*, 85 F.3d at 274 and citing favorably several other Seventh Circuit decisions). The Eleventh Circuit also relied on authorities from the Third, Sixth, Eighth, and Ninth Circuits, recognizing that "[s]everal other circuits . . . have agreed that a truly lateral transfer cannot be adverse." *Id.*; *see also id.* at 1450 ("[O]ur sister circuits have only held transfers to be adverse where the transfers were objectively equivalent, at least to some degree, to demotions.").

Notably, the Eleventh Circuit in *DeKalb County* expressly held that its decision was not inconsistent with its earlier opinion in *Maddow*. *Id.* at 1448-49 & n.13 (citing *Maddow*).

Indeed, the *DeKalb County* Court noted that the facts in *Maddow* would have supported a claim of age discrimination under its objective standard for an adverse employment action. *Id.* at 1452.

In short, the Eleventh Circuit's rule is the same as that of the Seventh Circuit, as well as of other Circuits that have addressed the question: transfers can be the basis for a claim of discrimination, but only if the employee can show some materially adverse employment consequence from the transfer or refusal to transfer. *Id.* at 1453 (citing Seventh Circuit decisions in *Williams* and *Crady v. Liberty National Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)). Under the facts here – where Ritcheson failed to point to any adverse employment consequence from the denial of her transfer, Pet. App. 4a-5a – her claim would have met the same fate in the Eleventh Circuit as it did in the Seventh.[2]

2. Although the Circuits do appear to disagree with respect to the degree of adversity required to state a claim for *retaliation* under Title VII and the ADEA, this case does not present the question on which disagreement exists. Ritcheson did not appeal the District Court's rejection of her retaliation claim, Pet. App. 2a, and her petition concedes that her retaliation claim is not before this Court. Pet. at 5 n.3 ("Ritcheson sued for retaliation as well, but did not pursue that claim on appeal."). The Court thus should await a retaliation case to resolve any disagreement between the Circuits on this point.

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[2] The purported conflict with *Rutan v. Republican Party*, 497 U.S. 62 (1990), *see* Pet. at 15-17, likewise provides no basis for this Court's review. The fact that the *Rutan* Court determined that "transfers . . . based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees," *id.* at 75, sheds no light on the meaning of the anti-discrimination provisions in Title VII and the ADEA, and in no way conflicts with the decision below.

Retaliation claims and discrimination claims are distinct causes of action, grounded in different statutory text and different congressional policies. Unlike the core anti-discrimination provisions of Title VII and the ADEA, *see* 42 U.S.C. § 2000e-2(a)(1), (a)(2); 29 U.S.C. § 623(a)(1), (a)(2), the anti-retaliation provisions in those statutes do not limit the forbidden discrimination to the "terms, conditions, or privileges of employment." Instead, the anti-retaliation provisions simply state that it is unlawful to "discriminate against any . . . employees or applicants for employment . . . because he has opposed . . . an unlawful employment practice . . . or because he has made a charge" of discrimination. 42 U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (ADEA). The Circuits have taken varying views with respect to the nature of the employment action required to trigger liability under these anti-retaliation provisions. *See, e.g., White v. Burlington Northern & Santa Fe Railway Co.*, No. 00-6780, __ F.3d __, 2004 WL 789726, *5-*13 (6th Cir. April 14, 2004) (en banc) (describing varying views); *id.* at *17-*24 (Clay, J., concurring) (same); *Ray v. Henderson*, 217 F.3d 1234, 1240-43 (9th Cir. 2000) (same). There may come a retaliation case in which the choice of standard makes a difference, and this Court may then want to review that case. But that hypothetical case would turn on this Court's interpretation of the text and purpose of the anti-retaliation provisions. The petition in this case – which does not even involve a retaliation claim – does not present that question.

3. Nor is there any need for this Court to review whether there is an "adverse action" requirement at all, *see* Pet. at 9-12, because the Seventh Circuit's conclusion that there is such a requirement is consistent with the conclusion of every Court of Appeals and is plainly correct. At the outset, Ritcheson does not even contend that the Circuits are divided on this point. *See id.* The uniformity among the

Circuits is unsurprising. By their terms, the anti-discrimination provisions of Title VII and the ADEA prohibit only "discrimination against" an individual with respect to hiring, firing, and the individual's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1); *see* 42 U.S.C. § 2000e-2(a)(2) (prohibiting limiting, segregating, or classifying employees so as to "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee"); *see also* 29 U.S.C. § 623(a)(1), (a)(2) (same prohibitions with respect to age). These terms necessarily qualify the reach of the anti-discrimination provisions. *See EEOC Compliance Manual* § 8, "Retaliation," at 8-14 (May 20, 1998), available at http://www.eeoc.gov/docs/retal.html.[3] To fit within the statutory text, a plaintiff must show that her employer's actions have materially affected her "compensation, terms, conditions, or privileges of employment."[4] This limitation makes perfect sense. Otherwise, as Judge Posner has observed, "every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." *Williams*, 85 F.3d at 274; *see also, e.g., Ledergerber*, 122 F.3d at 1144; *DeKalb County*, 145 F.3d at 1448.[5]

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[3] The EEOC's views on the meaning of these provisions, which the EEOC is empowered to enforce, are at least entitled to respect. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

[4] None of the cases from this Court cited by Ritcheson, *see* Pet. at 10-12, are to the contrary. Indeed, this Court has made clear that, to support a claim of discrimination, a plaintiff must show that her terms or conditions of employment have been affected. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 786-88 (1998).

[5] If, as Ritcheson suggests, *see* Pet. at 12, an employer placed a sign on its door to the effect that "Women Need Not Apply For Transfer to This

Requiring a materially adverse effect on the terms and conditions of employment is particularly appropriate where, as here, a plaintiff relies solely on the *McDonnell Douglas* burden-shifting framework. Absent such a requirement, a plaintiff without any direct proof of discrimination could create a presumption of discrimination even though the employer has done nothing to harm the individual. *See* 1 Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 16 (3d ed. 1976) ("Establishing a prima facie case under the *McDonnell Douglas-Burdine-Hicks* model creates a presumption of illegal discrimination because it eliminates the most likely legitimate explanations for the employer's adverse action . . . ."). In the absence of an adverse action, an inference of discrimination would make no sense. That is doubtless why Courts of Appeals have uniformly interpreted the *McDonnell Douglas* framework to require proof of some materially adverse action with respect to the terms or conditions of a plaintiff's employment. *See, e.g., Pegram*, 361 F.3d at 281; *Galabya*, 202 F.3d at 639; *Bramble v. American Postal Workers Union*, 135 F.3d 21, 24-25 (1st Cir. 1998); *Kocsis*, 97 F.3d at 882.[6] Indeed, a leading employment law treatise describes "[t]he third prong of the prima facie case" as "whether the plaintiff suffered an adverse employment action." Lindemann & Grossman, *supra*, at 16 (Supp. 2002). And, of direct relevance here, it observes that "[c]ourts have held that a lateral transfer with no decrease in pay or benefits is not an adverse employment action . . . ." *Id.*

Office, This Site Reserved For Young Men," that would be a different case. Such a no-transfer policy for one subset of employees would affect the terms and conditions of employment.

[6] In many cases, adversity is self-evident, such as where the plaintiff has been terminated or demoted. *See DeKalb County*, 145 F.3d at 1448.

Here, the plaintiff relied solely on the *McDonnell Douglas* burden-shifting framework to defend against summary judgment. *See* Pl.'s Opp. to S.J. Mot. at 2.[7] She had no evidence to support her claim that the refusal to transfer would cause any adverse effect on her employment – indeed, the Seventh Circuit held that she essentially waived any such claim by failing on appeal to cite record evidence to support her arguments on that point. *See* Pet. App. 4a-5a. The courts below therefore properly granted summary judgment to CC Services, and nothing in their decisions warrants further review by this Court.[8]

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[7] Although petitioner now points to a stray comment by Leo Stephan of CC Services, Pet. at 4, she did not attempt to make out a "direct evidence" case of discrimination in the courts below nor did she contend that the comment was enough to defeat summary judgment. *See* Pl.'s Opp. to S.J. Mot. at 2; Br. of Appellant, No. 03-1633 (7th Cir. filed May 9, 2003); Reply Br. of Appellant, No. 03-1633 (7th Cir. filed June 24, 2003). It is too late to do so now. *See, e.g., United States v. Galletti*, 124 S. Ct. 1548, 1552 n.2 (2004). In any event, a claim that the Seventh Circuit overlooked any such evidence implicates at most mere error correction and does not merit this Court's review.

[8] There is no reason to hold this case pending the Court's resolution of *Pennsylvania State Police v. Suders*, No. 03-95. Resolution of the question presented in *Suders* – which involves whether a "constructive discharge" is a tangible employment action that could justify imposing vicarious liability on the employer – will in no way affect the decision below in this case. No one disputes here that the denial of the transfer was an action attributable to the employer. The question is whether that denial of a purely lateral transfer, without more, can support a prima facie case of employment discrimination.

CONCLUSION

The petition should be denied.

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